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IN THE
COURT OF APPEALS OF INDIANA

Nathan McCain, as Trustee of the 237 Columbia Street Land Trust,

Appellant-Petitioner,

v.

Town of Andrews, Indiana, and Huntington Countywide Department of Community Development,

Appellees-Respondents.

December 30, 2021

Court of Appeals Case No. 21A-PL-1252

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-2011-PL-692

Weissmann, Judge.

[1] When a hearing authority declares a home unsafe and orders demolition, Indiana Code § 36-7-9-8(b) gives the owner 10 days after the date "when the action was taken" to file a complaint appealing the decision. The parties in this matter dispute the meaning of "when the action was taken." According to the hearing authority, the action occurred at the hearing. The owner disagrees, arguing that action was not taken until the next day, when the order was filed in the auditor's office. We find the trial court properly dismissed the appeal as untimely.

Facts

[2] On October 26, 2020, the Town of Andrews Town Council (the Town) ordered the solicitation of bids for demolition of a home owned by Nathan McCain, Trustee of the 237 Columbia Street Land Trust (the Trust). The next day, the Town filed a copy of the order with the county auditor. The Town also sent copies of the order to the Trust and the dwelling address. This certified mail was delivered on October 30, 2020. Supp. App. Vol. II, p. 77.

[3] The order soliciting demolition bids was the culmination of months of prior proceedings:

- 12/17/19: The dwelling failed a county inspection. *Id.* at 25.
- 12/20/19: The owner was ordered to correct 8 violations within 60 days or face demolition of the dwelling. *Id.*

- 1/13/20: The Town declared the dwelling unsafe and abandoned. Contract buyers were ordered to complete the work to reach compliance by 2/18/20. *Id.* at 31-34.

- 2/24/20: Noting progress, the Town agreed to wait until 8/10/20 to follow up. The Town then extended the deadline to 9/14/20. *Id.* at 44, 53.

- 9/14/20: The Town noted that progress had stalled and allowed 30 additional days for compliance. *Id.* at 60.

- 10/26/20: The Town ordered the solicitation of bids for demolition. *Id.* at 73.

- 10/27/20: The Town file marked its order with the county auditor.

[4] Although the Town notified the Trust by certified mail of all actions and hearing dates, no one with a substantial interest in the property appeared at either the September or October meetings. *Id.* at 59; App. Vol. II, p. 11.

[5] Eleven days after the Town requested demolition bids, McCain filed a complaint for judicial review pursuant to Indiana Code § 36-7-9-8. The Town moved to dismiss the complaint under Indiana Trial Rule 12(b)(6), arguing that it was untimely. The trial court granted the motion with prejudice, and McCain now appeals.

Discussion and Decision

[6] McCain advances two arguments on appeal. First, he argues that his complaint was timely because the 10-day deadline was not triggered until October 27, when the Town filed the order with the auditor. Second, he argues that Indiana

Code § 36-7-9-8(b) is unconstitutional as applied under Article 1, Section 12 of the Indiana Constitution. We find neither of these arguments availing and affirm the trial court.

I. Untimeliness

[7] McCain's argument concerning the timeliness of his appeal hinges on whether the Town "took action," as contemplated by Indiana Code § 36-7-9-8(b), on the day of the hearing, when the Town decided to solicit demolition bids, or the next day, when the order was filed with the county auditor. Following our rules of statutory interpretation, we determine that the Town "took action" the day of the hearing, meaning McCain's appeal was properly dismissed as untimely.

[8] A motion to dismiss under Trial Rule 12(B)(6) "tests the legal sufficiency of the plaintiff's claim, not the facts supporting it." *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017) (quoting *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015)). We therefore review *de novo* the dismissal of a case for failure to state a claim, meaning we give no deference to the trial court's decision. *Id.* Dismissal under Rule 12(B)(6) is improper unless it is clear on the face of the complaint that the complaining party is not entitled to relief. *Id.* In our review, we take the alleged facts to be true and view the allegations in the light most favorable to the nonmovant. *Id.* We also review questions of statutory interpretation *de novo*. *Salyer v. Wash. Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020). "When interpreting a statute, our primary

goal is to determine and give effect to the legislature's intent, and we give effect to the plain and ordinary meaning of statutory terms." *Id.*

[9] Action is defined as a "thing done" or "deed." *Action*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/action (last visited Dec. 6, 2021). By its very definition, "action" contemplates doing something, not memorializing it. This interpretation promotes the Town's position that its action occurred during the hearing—when it voted to order the solicitation of bids for demolition—rather than the next day, when that action was recorded with the auditor's office.

[10] The structure of Indiana's Unsafe Building Law, Indiana Code Chapter 36-7-9, also indicates that action is contemplated as something that happens at a hearing, not sometime later. "A hearing must be held" relative to most orders issued by the enforcement authority. Ind. Code § 36-7-9-7(a). At these hearings, "any person having a substantial property interest" in the premises subject to the order may appear in person or by counsel. Ind. Code § 36-7-9-7(c). To ensure owners have the opportunity to actively participate in the process, Indiana Code § 36-7-9-25 requires the hearing authority to notify the owner of the hearing by certified mail. The Law therefore creates a process that intends action regarding property to be taken in the presence of property owners at public hearings.

[11] Had the legislature intended "take action" to mean filing the order with the auditor, that requirement would be a provision of the Unsafe Building Law.

City of Lawrence Utils. Servs. Bd., 68 N.E.3d 581, 585 (Ind. 2017) ("As we interpret a statute, we are mindful of both what it does say and what it does not say."). But the statutory scheme does not require the hearing authority to file its findings with anyone, including the auditor. Nor does McCain provide any evidence that the county auditor is empowered to ratify the order in question, or that the filing occurred for any reason other than internal record-keeping. Thus, "action was taken" pursuant to Indiana Code § 36-7-9-8(b) when the Town issued the order during the hearing. McCain's appeal therefore was untimely.[1]

II. Constitutionality

[12] McCain asks us to disregard the untimely nature of his appeal because, in his view, Indiana Code § 36-7-9-8(b) is unconstitutional as applied under Article 1, Section 12.[2] Statutes are presumptively constitutional and we resolve all

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[1] Citing *Van Meter v. Cmty. Dev. & Redev.*, 152 N.E.3d 22, 26 (Ind. Ct. App. 2020), the Town argues that the October 26, 2020 order was not an appealable order. Rather, the Town contends, the appealable order was issued December 20, 2019. In *Van Meter*, this Court distinguished final, appealable orders from those actions cursorily reaffirming previous orders, which are not themselves appealable. But we need not determine which type of order was at issue here; either way McCain's appeal was untimely.

[2] McCain also challenges the statute under Article 1, Section 23 of the Indiana Constitution, which requires equal privileges and immunities for all citizens. *See, e.g.*, *Martin v. Richey*, 711 N.E.2d 1273, 1280 (Ind. 1999). When a statute creates classifications and either grants privileges or imposes burdens based on those classifications, it must satisfy two requirements. *Id.* "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Id.* (quoting *Collins v. Day*, 644 N.E.72, 80 (Ind. 1997)).

McCain argues that the statute is not "uniformly applicable" to property owners, violating the second prong of this analysis. But McCain makes no argument Indiana Code § 36-7-9-8(b) creates classifications that grant privileges or impose burdens. Applying Article 1, Section 23 analysis where no statutory classification exists is nonsensical.

reasonable doubts in favor of constitutionality. *State v. Timbs*, 169 N.E.3d 361, 367 (Ind. 2021). McCain argues that because he received notice of the order soliciting demolition bids only 1 day before the 10-day statutory deadline, the deadline as applied was "arbitrarily unreasonable." Appellant's Br., p. 13. We disagree.

[13] Article 1, Section 12 guarantees remedies by "due course of law," which affords analogous civil procedural rights to those guaranteed by the Due Process Clause of the Fourteenth Amendment. *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000); *Melton v. Ind. Athletic Trainers Bd.*, 53 N.E.3d 1210, 1215 (Ind. Ct. App. 2016). In evaluating McCain's due process claim, we consider two questions: Was there a deprivation of a constitutionally protected property interest? And what process is due? *Melton*, 53 N.E.3d at 1215.

[14] Certainly, a protected property interest is at stake. *See Podgor v. Ind. Univ.*, 381 N.E.2d 1274, 1281 (Ind. Ct. App. 1978) ("'Property interests,' protected by procedural due process, 'extend well beyond ownership of real estate . . . .'"). But McCain was not denied due process. We have previously held that attempts to enforce compliance with the Unsafe Building Law culminating in a demolition order do not violate due process. *409 Land Trust v. City of South Bend*, 709 N.E.2d 348, 351 (Ind. Ct. App. 1999). This case is no different.

[15] Generally speaking, due process requires notice and an opportunity to be heard. *Melton*, 53 N.E.3d at 1219. The condition of the property at issue has been on the Town's radar since 2016. Supp. App. Vol. II, p. 82. Pursuant to Indiana

Code § 36-7-9-25, the Town mailed copies of every order related to enforcement of the Unsafe Building Law to both the dwelling address and the Trust's address. The first order was sent on December 20, 2019, when the dwelling was deemed unsafe. Supp. App. Vol. II, p. 25-29. The Town sent an additional 4 orders over the next 10 months, each of which stated the action taken and the need for the repair to the premises. *Id.* at 31-35, 43-47, 59-63, 73-77. Despite the multiple notices concerning the safety risks posed by the dwelling, most of the hearings went unattended by anyone with a property interest. No one appeared for the last two hearings, nor did anyone appear for an inspection of the premises a week prior to the last hearing. *Id.* at 59, 69, 73. Record of the October 26, 2020 hearing, when the Town ordered solicitation of demolition bids, was delivered to the Trust on October 30, within 4 days of the statutory deadline. *Id.* at 77. In other words, McCain's due process argument amounts to an attempt to circumvent his own inaction.

[16] The trial court's judgment is affirmed.

Mathias, J., and Tavitas, J., concur.